Dischargeability
11 U.S.C. § 523(a)(6)
Conversion
Claim Preclusion

Robins Group LLC v. Capo 96-6291-fra
Main Case: In re Felix Capo 696-65489-fra7

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Plaintiff obtained a jury verdict against the Defendant in Oregon state court for $170,000, $100,000 of which was determined to be allocable to conversion. Soon after the judgment, a co-defendant paid $60,000 which was applied toward the Defendant's obligation, leaving a judgment of $110,000 plus interest. Plaintiff alleges that it has applied the $60,000 payment to the non-conversion part of the judgment, leaving the $100,000 conversion judgment intact. Plaintiff filed a motion for summary judgment in this adversary proceeding seeking a determination that the $100,000 conversion debt is nondischargeable under § 523(a)(6).

The court determined that "conversion" under Oregon law requires the same elements of proof as is required to find a debt nondischargeable under § 523(a)(6). Under principles of claim preclusion, those elements will not be relitigated. However, there was insufficient evidence in the record to determine whether the Plaintiff had, in fact, allocated the $60,000 pre-petition to the non-conversion part of the judgment. A further evidentiary hearing is necessary to determine that issue. Plaintiff was granted partial summary judgment, the court holding that whatever amount of the conversion judgment which is determined to be unpaid is nondischargeable under § 523(a)(6).

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

IN RE	)	
	)	
FELIX R. CAPO,	)	Case No. 696-65489-fra7
	)	
Debtor.	)	
	)	
ROBINS GROUP LLC,	)	
	)	
Plaintiff,	)	
vs.	)	Adversary No. 96-6291-fra
	)	
FELIX R. CAPO,	)	
	)	MEMORANDUM OPINION
Defendant.	)	

Plaintiff seeks a judgment declaring that a debt owed to it by Defendant cannot be discharged in bankruptcy, and has filed a motion for summary judgment. For the reasons set out in this memorandum opinion, I find that the Plaintiff should be granted partial summary judgment on its motion.

I. BACKGROUND

Fed. R. Bankr. P. 7056 incorporates Fed. R. Civ. P. 56. This rule provides that

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> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The motion and supporting documents establish that:

1. Plaintiff maintained an action against Defendant and one other person in the Circuit Court for Multnomah County, seeking damages for conversion and money had and received.

2. After trial, and based on a jury verdict, the Circuit court entered findings that Defendant converted money or property from Plaintiff in connection with what was described as the "ProWest transaction," and that the value of such money was $100,000. In addition, the Court found that the value of money that Defendant "received for his own use and benefit under the money had and received claim from [Plaintiff] through the ProWest transaction was $170,000." A money judgment was entered in the sum of $170,000, plus prejudgment interest of $21,787.40. Post judgment interest accrues at the statutory rate of 9% per annum on $110,000.

3. After the trial, but before the judgment was entered, the claim was partially satisfied by a payment of $60,000 from a co-defendant. The judgment reflected this payment, but made no reference to allocation between the two claims. The payor gave no instruction as to how the payment was to be applied. The affidavit supporting Plaintiff's motion states that Plaintiff "has elected" to allocate the payment to "the $70,000 portion of

the Judgment not allocated to debtor's [i.e., Defendant here] conversion ... and thereby allocating no portion of the payment to the portion of the Judgment based on the $100,000 conversion verdict...."

II. DISCUSSION

A debt is not discharged in a Chapter 7 bankruptcy to the extent it arises from a willful and malicious injury by the debtor to another entity or to the property of another entity. 11 U.S.C. § 523(a)(6). Plaintiff takes the position that the state court case necessarily determined that the debt at issue here arose from a "willful and malicious injury," and that Defendant is precluded from relitigating the issue here. It further asserts that, since it is entitled to allocate the partial payment as it wishes, the entire $100,000 conversion claim remains unpaid, as well as undischarged.

It is well established in this circuit that the preclusive effect of a state court judgment must be given the same effect by federal courts as by the courts of the rendering state. Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995). Thus, disposition of Plaintiff's motion requires consideration of three issues: (1) the scope of the "willful and malicious injury" exclusion, (2) whether conversion, as defined by Oregon law, necessarily involves such injury, and (3) whether plaintiff is, as a matter of law, entitled to make the allocation it asserts.

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A. Discharge of Conversion Claim

Discharge of particular debts is a question of federal bankruptcy law. Grogan v. Garner, 498 U.S. 279, 284 (1991). As noted, 11 U.S.C. § 523(a)(6) excepts from a debtor's general discharge debts incurred as a result of the debtor's willful and malicious injury to another person, or another person's property. The Court of Appeals for the Ninth Circuit has cited with approval the discussion set out in Collier on Bankruptcy:

> In order to fall within the exception of section 523(a)(6), the injury to an entity or property must have been willful and malicious. An injury to an entity or property may be a malicious injury within this provision if it was wrongful and without just cause or excessive, even in the absence of personal hated, spite, or ill-will. The word "willful" means "deliberate or intentional," a deliberate and intentional act which necessarily leads to injury. Therefore, a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury.

In re Cecchini, 780 F.2d 1440, 1443 (9th Cir. 1986)(citing 3 Collier on Bankruptcy, ¶523.16 (15th Ed. 1983)).

Both the Court of Appeals and the Bankruptcy Appellate Panel for this circuit have held that conversion of another's property constitutes a willful and malicious injury, and therefore gives rise to a nondischargeable debt. In re Cecchini, 780 F.2d 1440, 1443 (9th Cir. 1986); In re Giangrasso, 145 B.R. 319 (B.A.P. 9th Cir. 1992).

Both of the aforementioned cases involved conversion claims arising under California law, and reduced to judgment in a California court. While the general concept of "conversion" may be universal, it goes without saying that the particulars of the

cause of action may vary from one state to the next. What remains to be determined, then, is whether the elements of conversion under Oregon law include deliberate conduct which necessarily causes injury.

Oregon courts have accepted the definition of conversion adopted by the authors of Restatement (Second) of Torts (1965):

> s. 222A. What Constitutes Conversion (1)Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel. (2)In determining the seriousness of the interference and the justice of requiring the actor to pay the full value, the following factors are important: (a) the extent and duration of the actor's exercise of dominion or control; (b) the actor's intent to assert a right in fact inconsistent with the other's right of control; (c) the actor's good faith; (d)the extent and duration of the resulting interference with the other's right of control; (e)the harm done to the chattel; (f) the inconvenience and expense caused to the other.

Mustola v. Toddy, 253 Or. 658, 663, 456 P.2d 1004, 1007 (1969).

In order to enter its conversion judgment against Defendant, the Oregon court necessarily determined that Defendant acted intentionally, and that his intentional act necessarily injured Plaintiff's property interests. These issues may not be relitigated here. It follows that Plaintiff is entitled, as a matter of law, to a judgment declaring that the unpaid portion of the conversion judgment is not subject to discharge.

The jury in the preceding case was instructed that Plaintiff

was not required to find that Defendant had acted in bad faith. Defendant now argues that this means that the jury never determined whether Defendant had acted maliciously, and that the issue therefore remains undecided. This assumes, incorrectly, that "malice", as the term is used in the Bankruptcy Code, is the equivalent of "bad faith." An act is malicious if done without just cause or excuse; it is not necessary to show a specific intent to injure. In re Cecchini, 780 F.2d at 1443. Likewise, it is not necessary to show bad faith to establish conversion under Oregon law; Oregon law regarding conversion, as reflected by the instruction, and bankruptcy law are consistent in that regard.

B. Allocation

Plaintiff was awarded $100,000 on its conversion claim, and $170,000 on its money had and received claim. Both claims arise from the same transaction and obviously overlap. At the outset (that is, prior to the partial payment), $100,000 of the claim was not subject to discharge. At the time the petition for relief was filed, the debt had been reduced. Plaintiff claims the right to allocate the payment to the dischargeable "portion" of the debt, citing to Kincaid v. Fitzwater, 257 Or. 170, 173, 474 P.2d 742 (1970) and Johnson Lumber Corp. v. Leonard, 192 Or. 639, 670-71, 236 P.2d 926 (1951). Defendant does not appear to dispute Plaintiff's claim that it made an election, but nevertheless asserts that the payment must be allocated pro rata between the dischargeable and non-dischargeable portions of the claim.

Generally, the rights of the debtor and creditors in bankruptcy proceedings are fixed as of the date the petition for relief is filed. See McDonald v. McDonald, 31 B.R. 79 (Bankr. D. Neb. 1983). Further, post-petition allocation by a creditor of a payment to a portion of a judgment against the debtor would violate the automatic stay imposed by § 362(a).[1] If the payment was *actually* allocated prior to the date Defendant filed his petition, Kincaid and Johnson Lumber Corp. are controlling. If, however, no allocation was made, allocation is to be made by this court, applying federal law.

Federal Courts have taken varying approaches to the allocation issue. In In re The Securities Groups, 116 B.R. 839 (M.D. Fla. 1990) the court held that, absent any allocation by the parties, it should allocate payments among the claims in accordance with justice and equity in order to protect and maintain rights of both debtor and creditor. Other courts, after determining the equities of the case, have held that payments should be allocated pro rata between separate claims. In re Hunter, 771 F.2d 1126 (8th Cir. 1985); In re Bozzano, 183 B.R. 735 (M.D. N.C. 1995).

The matter cannot be decided on the record now before the

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[1]"The scope of the [automatic] stay is quite broad . . . .It is designed to effect an immediate freeze of the status quo by precluding and nullifying post-petition actions, judicial or nonjudicial, in nonbankruptcy fora against the debtor or affecting the property of the estate." Hollis Motors, Inc. v. Hawaii Automobile Dealers Assoc., 997 F.2d 581 (9th Cir. 1993)[internal citations omitted].

court. All that is established is that plaintiff made-- or tried to make -- its allocation prior to the time the adversary proceeding was commenced. It is not clear whether Plaintiff took any concrete action, or even made a conscious decision, respecting allocation prior to the time the bankruptcy case was commenced.[2]

Whether an allocation actually occurred pre-petition, or what allocation the court should make if none occurred, must be determined in further proceedings.

III. CONCLUSION

It is undisputed that a judgment was entered against Defendant in State court for conversion of Plaintiff's property. The judgment necessarily determined that the debt is the result of Defendant's willful and malicious act. Plaintiff is entitled to partial summary judgment to the effect that the portion of the conversion judgment which remains unpaid may not be discharged in this case. The amount of the nondischargeable debt remains to be determined. An order consistent with the foregoing shall be entered.

FRANK R. ALLEY, III
Bankruptcy Judge

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[2]The court makes no finding at this point as to what actions constitute an election to allocate.